Supreme Court, U.S.
FILED
FEB 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 87-907

In the Supreme Court of the United States

OCTOBER TERM, 1987

PETER LARM, M.D., AND HARUKO LARM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
LOUIS M. FISCHER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioners' convictions for knowingly submitting false claims for Medicaid payments, in violation of 42 U.S.C. 1396h(a)(1).

2. Whether the materiality of false statements under 42 U.S.C. 1396h(a)(1) is a question of law to be decided by the court.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Bronston v. *United States*, 409 U.S. 352 (1973)	6
Nilson Van & Storage Co. v. *Marsh*, 755 F.2d 362 (4th Cir.), cert. denied, 474 U.S. 818 (1985)	7
United States v. *Abadi*, 706 F.2d 178 (6th Cir.), cert. denied, 464 U.S. 821 (1983)	7
United States v. *Adler*, 623 F.2d 1287 (8th Cir. 1980)	7
United States v. *Bernard*, 384 F.2d 915 (2d Cir. 1967)	7
United States v. *Brown*, 763 F.2d 984 (8th Cir.), cert. denied, 474 U.S. 905 (1985)	4, 7
United States v. *Corsino*, 812 F.2d 26 (1st Cir. 1987)	7
United States v. *Greber*, 760 F.2d 68 (3d Cir.), cert. denied, 474 U.S. 988 (1985)	7
United States v. *Irwin*, 654 F.2d 671 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982)	7
United States v. *McIntosh*, 655 F.2d 80 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982)	7
United States v. *Valdez*, 594 F.2d 725 (9th Cir. 1979)	7

Statutes:

18 U.S.C. 1001	7
42 U.S.C. 1396h(a)(1)	2, 4, 5, 7

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-907

PETER LARM, M.D., AND HARUKO LARM, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 824 F.2d 780.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1987. A petition for rehearing was denied on September 30, 1987 (Pet. App. 15a-16a). The petition for a writ of certiorari was filed on November 30, 1987 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Hawaii, petitioner Peter Larm, M.D., was convicted on 17 counts of Medicaid fraud, in violation

of 42 U.S.C. 1396h(a)(1). His wife, petitioner Haruko Larm, was convicted on 94 counts of the same offense.[1] They were each given a suspended sentence, placed on probation for five years, and fined $25,000. The court of appeals affirmed (Pet. App. 1a-10a).

The evidence at trial showed that from July 1979 through June 1983, Dr. Larm, who specialized in the treatment of allergies, and Haruko Larm, his wife and office manager, submitted false claims to the Hawaii Medical Service Association (HMSA), the fiscal intermediary for the Medicaid program in Hawaii. The false claims were for office visits by patients whom Dr. Larm did not see or treat (Counts 1-84), for office visits and administration charges for injections that his patients administered by themselves (Counts 85-94), and for allergy shots, as to which Dr. Larm charged for an expensive allergy serum when the medication actually given was a less expensive bee extract serum (Counts 95-98). Dr. Larm was convicted on those counts for which he actually signed the claim form; Mrs. Larm was convicted on all the office visit and administration counts. See Pet. App. 3a-4a, 6a.

On appeal petitioners argued that the evidence was insufficient to show that they knowingly submitted false claims. First, petitioners argued that the claims for office visits (Counts 1-84) were not in fact false. Petitioners submitted claims using billing code 90040 for shots administered to patients when Dr. Larm was not in the office. That code covers a "[b]rief examination, evaluation and/or treatment" for an illness. Such an examination includes a "brief or interval history, examination, discussion of finding and/or rendering of service." Pet. App. 4a.

---

[1] Dr. Larm was acquitted on 81 similar counts, and Haruko Larm was acquitted on four counts (Pet. App. 3a-4a).

Petitioners argued that the administration of an allergy shot was a "[b]rief * * * treatment," which included a "rendering of service" and that nothing in the terms of billing code 90040 required the presence of the physician. Petitioners further argued that, even if the claims were false, they did not knowingly and willingly make the false claims.

The court of appeals rejected both of those arguments. The court noted (Pet. App. 4a) that billing code 90040 appears on the same page as code 90030, which "fits exactly the service rendered in the office visit counts." Code 90030 applies to: "Minimal service: injections, minimal dressings, etc., not necessarily requiring the presence of a physician." The court concluded (*ibid.*) that "[t]he snug fit between 90030 and the service actually rendered forecloses any argument that 90040 was the correct code." Furthermore, the court noted (*id.* at 4a-5a), petitioners had twice been warned by an HMSA representative that a 90040 billing required the physician's presence. Under those circumstances, the court concluded (*id.* at 5a), the statements were false, and "[t]here [was] ample evidence of knowledge of falsity" by petitioners.[2]

Petitioners also argued on appeal that the district court erred in deciding that the false statements on the claim forms were material as a matter of law rather than sub-

---

[2] The court rejected two other sufficiency arguments made by petitioners, neither of which has been raised here. First, the court found (Pet. App. 5a) that "[t]he testimony established that * * * the Larms knew that an administrative charge was inappropriate" for injections that the patients administered themselves (Counts 85-94). Second, the court concluded (*id.* at 6a) that Dr. Larm was properly convicted on the allergy counts (Counts 95-98) in light of testimony of one of his nurses that "she reported the overcharge [for more expensive serum than was actually used] to Dr. Larm, and he replied that his office 'would make an adjustment.' No adjustment was ever made * * * ."

mitting the issue to the jury. The court of appeals noted (Pet. App. 6a) that "a long line of cases" held "that the materiality of a perjured statement is a question of law." The court further stated (*ibid.*) that there was "no principled way to distinguish this case from the perjury cases" since "[b]oth concern the question of whether a false statement is reasonably calculated to induce reliance." The court therefore followed the decision of the Eighth Circuit in *United States* v. *Brown*, 763 F.2d 984, cert denied, 474 U.S. 905 (1985), which held that the question of materiality under Section 1396h(a)(1) is a matter of law. Even if that conclusion was wrong, however, the court stated (Pet. App. 7a) that it would find the error harmless, "because the statements here undoubtedly were material, designed as they were to induce payment."

Judge Wiggins concurred in part and dissented in part (Pet. App. 8a-10a). He dissented with respect to the office visit counts, because in his view petitioners' use of the 90040 billing code was literally true. Judge Wiggins' concluded (*id.* at 8a) that petitioners' billing under code 90040 was acceptable—even though code 90030 accurately described Dr. Larm's services—because the administering of an allergy shot by a nurse was "indisputably a '[b]rief . . . treatment,' including a 'rendering of service' " and thus met the definition under code 90040. Any ambiguity in the billing codes, he argued (*id.* at 9a-10a), should have been resolved in petitioners' favor.

ARGUMENT

1. Petitioners contend (Pet. 14-37) that their convictions should be reversed because they were not given notice that their conduct was criminal. But 42 U.S.C. 1396h(a)(1), the statute under which petitioners were convicted, clearly prohibits making "any false statement or

representation of a material fact in any application for any benefit or payment under a[n approved] State plan." The HMSA scheme involved here qualifies as an approved State plan for purposes of Section 1396h(a)(1). Thus, petitioners were on fair notice that they could be held criminally liable for any false claims submitted to HMSA. The only remaining question is whether petitioners knowingly submitted false claims to HMSA. Their arguments to the contrary are, as the court of appeals recognized (Pet. App. 7a-8a), "ultimately an attack on the sufficiency of the evidence."

Petitioners argue that billing code 90040 was literally true as applied to nurse-administered allergy shots when Dr. Larm was not in the office. In the alternative, they contend that even if the claims were false, petitioners did not know that they were false. Petitioners made these same arguments at trial, but the jury concluded otherwise. Petitioners do not challenge the instructions given the jury that, before convicting, the jury must conclude both that the claims submitted by petitioners were false and that petitioners knew they were false. Petitioners merely dispute the conclusion reached by the jury.

There were ample grounds for the jury's conclusion. First, as the court of appeals observed (Pet. App. 4a), any ambiguity in the meaning of billing code 90040, which applied to a "[b]rief examination, evaluation and/or treatment" (*ibid.*), was put to rest by billing code 90030, which applied to a different class of service, referred to as "[m]inimal service" (*ibid.*). "Minimal service" was defined in billing code 90030 to include injections. Thus, it was clear from the context, if not from the contents of billing code 90040 standing alone, that an injection should be billed as a "[m]inimal service," not as a "[b]rief examination, evaluation, and/or treatment."

Second, the evidence was clear that petitioners were on notice that injections did not fall under billing code 90040. As the court of appeals recounted (Pet. App. 4a-5a), a Medicaid representative twice informed petitioners that a billing under billing code 90040 required the presence of the physician. Yet petitioners nonetheless continued to use billing code 90040 to bill for injections given when Dr. Larm was not present.

Third, there was other evidence as well that petitioners knew the billing of injections as if they were office visits was improper. An employee who had worked at Dr Larm's office in 1982 testified that she had had a conversation with Mrs. Larm regarding a complaint from a patient about being billed for an office visit when he had not seen the doctor. According to the witness, Mrs. Larm responded to the inquiry by saying: "Don't worry about that. That's the taxpayers' people's money" (Tr. 1102).

Under these circumstances, there was no room for doubt that injections administered in the absence of the physician should have been billed under billing code 90030, rather than under billing code 90040, and that petitioners knew it. As the court of appeals concluded (Pet. App. 8a), "the jury found that [petitioners] understood the significance of the billing codes that they used, and the record supports this finding."[3]

2. Petitioners further argue (Pet. 37-43) that the court of appeals erred in holding that the materiality of their false statements was a question of law. There is, however,

---

[3] Unlike in *Bronston* v. *United States*, 409 U.S. 352, 353 (1973), on which petitioners rely (Pet. 21), their use of billing code 90040 was not merely "not responsive to the question asked and arguably misleading by negative implication." Rather, the jury found that they knowingly and intentionally used a false billing code in an affirmative act of deception designed to generate increased payments by HMSA.

no division among the circuits on this issue. The only other court of appeals that has decided the issue has also held that the materiality of false statements under Section 1369h(a)(1) is a question of law to be decided by the court rather than by the jury. *United States* v. *Brown*, 763 F.2d 984, 993 (8th Cir.), cert. denied, 474 U.S. 905 (1985).

Petitioners contend that materiality under Section 1369h(a)(1) should be treated in the same manner as materiality under 18 U.S.C. 1001. But the overwhelming majority of courts of appeals have held that materiality under Section 1001 is also a question of law rather than one of fact for the jury, and this Court has declined to review those decision. See, *e.g.*, *United States* v. *Corsino*, 812 F.2d 26, 31 n.3 (1st Cir. 1987); *United States* v. *Greber*, 760 F.2d 68, 72-73 (3d Cir.), cert. denied, 474 U.S. 988 (1985); *Nilson Van & Storage Co.* v. *Marsh*, 755 F.2d 362, 367 (4th Cir.), cert. denied, 474 U.S. 818 (1985); *United States* v. *Abadi*, 706 F.2d 178, 180 (6th Cir.), cert. denied, 464 U.S. 821 (1983); *United States* v. *McIntosh*, 655 F.2d 80, 82 (5th Cir. 1981), cert. denied, 455 U.S. 948 (1982); *United States* v. *Adler*, 623 F.2d 1287, 1292 (8th Cir. 1980); *United States* v. *Bernard*, 384 F.2d 915, 916 (2d Cir. 1967); contra, *United States* v. *Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), cert. denied, 455 U.S. 1016 (1982); *United States* v. *Valdez*, 594 F.2d 725, 729 (9th Cir. 1979). There is no reason for a different result here, particularly since the Ninth Circuit, which is one of the two courts that has held that materiality under Section 1001 is a question for the jury, concluded (Pet. App. 6a) that the issue in this case is comparable to the issue of materiality in a perjury case, which petitioners concede (Pet. 42) is a question of law.

Moreover, a contrary ruling on the legal issue petitioners present would not change the outcome of this case.

As the court of appeals noted (Pet. App. 7a), even if the question of materiality should have been submitted to the jury, the failure to do so was harmless because "the statements here undoubtedly were material, designed as they were to induce payment."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
LOUIS M. FISCHER
Attorney

FEBRUARY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988 — 202-037/60264